

most technical of senses does Richards' agreement with his friend constitute an agreement to "distribute" marijuana. The Commission should not, under the guise of its drug policy, simply label Richards a "drug trafficker" and deny renewal. The Commission must analyze the facts of record to determine whether they are of the egregious nature warranting the ultimate sanction of disqualification. An examination of these facts makes it clear that Richards remains qualified to be a Commission licensee.

1. The Statutory and Drug Policy Framework

In order to assess the seriousness of Richards' misconduct, it is necessary to review briefly the federal statutory framework applicable to drug-related transgressions. Section 841(a) of Title 21 of the United States Code provides that it is illegal to possess with intent to distribute a controlled substance, including marijuana. Distribution is defined broadly to include any transfer, whether or not for profit. See, e.g., U.S. v. Ramirez, 608 F.2d 1261, 1264 (9th Cir. 1979). The penalties for violation of Section 841(a) are set forth in Section 841(b). For first time offenders, possession with intent to distribute (i) defined amounts of such drugs as heroin, cocaine, phencyclidine (PCP), lysergic acid diethylamide (LSD), including 1,000 or more marijuana plants, calls for a mandatory minimum sentence of 10 years and maximum life imprisonment [Subsection (b)(1)(A)]; and (ii) lesser amounts of such drugs, including 100 or more marijuana plants, calls for a mandatory minimum sentence of five years and a maximum of 40 years [Subsection (b)(1)(B)]. In contrast, for first time offenders there is no mandatory minimum sentence for possession with an intent to distribute less than 50 marijuana plants and there is a maximum sentence of five years [Subsection (b)(1)(D)].

The rationale for treating possession of less than 50 marijuana plants more leniently than possession of 50 or more plants is as follows:

... Congress wanted to focus on major drug traffickers and it selected the 50-plant cutoff because it felt that at the 50-plant level the defendant was likely operating as a trafficker in illegal drugs. [Emphasis added.]

U.S. v. Holmes, 961 F.2d 599, 602 (6th Cir.), cert. denied, 121 L. Ed. 2d 168, 113 S. Ct. 232 (1992) ("... the 50-plant cutoff . . . is simply a legislative judgment that individuals cultivating 50 or more plants are likely to be major drug dealers and, hence, a bigger threat to society than those who grow fewer marijuana plants"). See, U.S. v. Webb, 945 F.2d 967 (7th Cir. 1991), cert. denied, 117 L. Ed. 2d 463, 112 S. Ct. 1228 (1992). In other words, persons growing fewer than 50 marijuana plants are basically not considered "drug traffickers" by Congress and U.S. v. Osborne, 955 F.2d 1500, 1508 (11th Cir.), cert. denied, 121 L. Ed. 2d 160, 113 S. Ct. 223 (1992) (more lenient treatment reflects Congressional belief "that growing a large number of plants (capable of large scale distribution) is an exponentially more severe offense than growing a small number").

2. Richards' Conviction

Based upon the foregoing statutory and policy framework and the cases construing it, Richards' conduct can not fairly be termed "drug trafficking" (see U.S. v. Webb, supra), a term never defined by the Commission in the Public Notice. Even if hyper-technically characterized as such, it is clear as a matter of law that, on a drug trafficking scale of one to ten, Richards' crime would rate a "minus one" in terms of seriousness. The de minimis nature of Richards' crime is also evidenced by his sentence. While eligible for up to five years in prison, Richards received seven months' house arrest and five years' probation. If he were the danger to society targeted by the Commission's drug policy, he would have served significant time. Moreover, the additional weapon in the district court's arsenal -- recommendation of deprivation of federal benefits -- was not invoked against Richards.

3. The Criteria for Disqualification

The Commission's criteria for assessing the qualifications of applicants and licensees are set forth in its Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986), recon. denied, 1 FCC Rcd 421 (1986), modified, 5 FCC Rcd 3252 (1990), recon granted, 7 FCC Rcd 6564 (1992) ("Character Policy Statement"). In the Character Policy Statement, the Commission noted that it might consider information that a person has engaged in nonbroadcast misconduct as prima facie evidence that such person lacks the requisite traits of reliability and/or truthfulness if the misconduct is "so egregious as to shock the conscience and evoke almost universal disapprobation." Id. at 1205 n.60. The Public Notice did not in any way change the tenets of the Character Policy Statement; it "merely clarified that the pre-existing policy of considering egregious nonbroadcast misconduct encompassed drug trafficking." South Carolina Radio Fellowship, 6 FCC Rcd 4823 (1991) ("Radio Fellowship").

The Commission applied the precepts of the Public Notice and the Character Policy Statement in Radio Fellowship, supra. A comparison of that case to the instant situation is instructive. In Radio Fellowship, the Commission revoked the license of a broadcaster whose controlling principal had been convicted of possessing cocaine with intent to distribute and of conspiring to commit that offense and had been sentenced to five years in prison. The statutory provisions violated included 21 U.S.C. Section 841(b)(1)(A)(ii) which applies to the intended distribution of 5 kilograms or more of cocaine. Radio Fellowship, 6 FCC Rcd 340, 341 (ALJ 1991). This same provision applies to the intended distribution of 1,000 or more marijuana plants. The principal admitted to selling and attempting to sell drugs for eight or nine months. Id.^{25/}

^{25/} The principal also admitted that he had twice bribed a law enforcement official to further his drug trafficking efforts and had deliberately misrepresented a fact in a petition to a judge to reduce his prison sentence. The Commission held these activities had a material bearing on the principal's propensity to be candid in communications with the Commission and to obey its rules and policies. South Carolina Radio Fellowship, 6 FCC Rcd at 4824.

Richards' conduct pales in comparison to the principal's in Radio Fellowship. Richards was growing 38 marijuana plants, only 19 of which were usable. The principal in Radio Fellowship was convicted of possessing with the intent to distribute the equivalent of at least 1,000 marijuana plants. Richards was growing the plants for his personal use and to return some of them to a friend; the Radio Fellowship principal admitted to selling cocaine to others for a profit. The Radio Fellowship principal was sentenced to five years in prison; Richards received supervised probation and seven months house arrest. Radio Fellowship presents a classic case of preying on fellow citizens through drug trafficking, the specific evil targeted by the Public Notice. Richards' case does not.

In sum, Richards conviction, standing alone and without any consideration of mitigating factors, does not warrant his disqualification to be a Commission licensee.

4. There are Also Mitigating Factors Which Compel Renewal.

When a felony conviction presents a prima facie case for disqualification, the Character Policy Statement permits a licensee to present evidence of mitigating circumstances or rehabilitation to demonstrate renewal is warranted notwithstanding the conviction. See Character Policy Statement, 102 FCC 2d at 1228; RKO General, Inc. (WAXY-FM), 5 FCC Rcd 642, 644 (1990); and Radio Fellowship, 6 FCC Rcd at 4824. Permissible mitigating evidence includes the frequency, recency and seriousness of the misconduct. Rehabilitation can be demonstrated by a showing that the applicant (i) has not been involved in any significant wrongdoing since the misconduct in question, (ii) enjoys a reputation for good character in his community and (iii) has operated his broadcast facility in compliance with the Commission's rules. Character Policy Statement, *supra*, and RKO General, Inc. (WAXY), *supra*.

The record contains ample evidence of mitigation and rehabilitation. As "drug trafficking" crimes go, it was "exponentially" less serious than most. Richards has not been involved in any wrongdoing since December 31, 1991. His low power television station has not been cited for any

FCC violations. (Tr. 177-78). Twenty-six members of the Sierra Vista community, all of whom had knowledge of his marijuana offense, unequivocally testified as to Richards' good character and outstanding reputation in the Sierra Vista community for truthfulness and honesty.

The question posed by the Richards case is whether every conviction for a drug related crime should automatically result in the disqualification of a licensee regardless of the relative seriousness of the violation. There is precious little precedent. In Radio Fellowship, 6 FCC Rcd. 4823 (1991), the Commission revoked the license of a broadcaster whose controlling principal was convicted of possessing cocaine with intent to distribute and of conspiring to commit that offense. He received a prison sentence of five years. In addition, the principal admitted bribing a law officer and filed a petition with the judge seeking a reduction of his prison sentence which contained deliberate misrepresentations. In this case, Richards was growing 38 marijuana plants, 10 of which were for a friend, and only 9 of which were suitable for his use. (R Ex. 30; Joint Ex. 1).^{26/} He was a user. He has not been a user or a grower since December 1991. His crime pales in comparison to the Radio Fellowship principal. As a result of his conviction, Richards has lost his home and the ranch on which he grew produce to make a living. He has been punished enough. He should not receive a death sentence from the Commission and the sentencing Judge did not recommend that such action be taken.

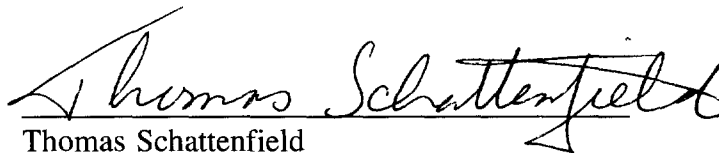
Given the presence of these mitigating factors, the fact that Richards regrets his use of marijuana and has broken the habit, and the nature of the misconduct, the renewal application must be granted. Compare Radio Fellowship, supra (revocation of license in view of serious misconduct and absence of mitigating evidence).


^{26/} Assuming there were 38 plants, half would have been discarded, leaving 19. Ten plants were his friend's, leaving 9 for Richards. Each plant yields 277 grams (5/8 of a pound) of usable marijuana, for a total of 2493 grams (2.4 kgs) or approximately 5-5/8 pounds. (Stipulation, Joint Ex. 1).

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the Initial Decision of the Administrative Law Judge should be reversed and the application of Richard Richards for renewal of the license of Low Power Television Station K33CG, Sierra Vista, Arizona, granted.

Respectfully submitted,


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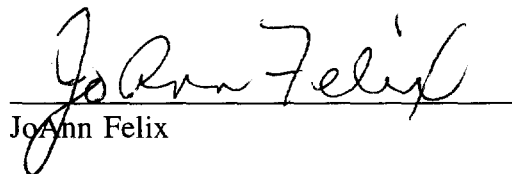
DATE: October 11, 1994

CERTIFICATE OF SERVICE

I certify that the foregoing Exceptions to the Initial Decision was served on the 11th day of October, 1994, by hand delivery to the following:

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